Supreme Court, U.S.
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No. 01-1042

IN THE

Supreme Court of the United States

MARGIE A. PICKETT,

Petitioner,

v.

PETROLEUM HELICOPTERS, INCORPORATED, WAUSAU INSURANCE COMPANIES, AND DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PETROLEUM HELICOPTERS, INC. AND WAUSAU INSURANCE COMPANIES

KENNETH H. LABORDE*
LEO R. MCALOON, III
GINA S. MONTGOMERY
PULASKI, GIEGER & LABORDE
Suite 4800, One Shell Square
New Orleans, Louisiana 70139
(504) 561-0400

Attorneys for Respondents Petroleum Helicopters, Inc. and Wausau Insurance Companies

* *Counsel of Record*

172203

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Petroleum Helicopters, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent, Wausau Insurance Companies, is not a stock corporation. Its parent companies are: Employers Insurance of Wausau, a Mutual Company; Wausau Underwriters Insurance Companies; Wausau General Insurance Company; and Wausau Business Insurance Company.

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STATEMENT OF THE CASE

A. Background

At all times pertinent herein, Petroleum Helicopters, Inc. (PHI) maintained a heliport in Cameron, Louisiana. From its heliport, PHI provided helicopter transportation of personnel and supplies for operations conducted on the outer Continental Shelf for the purposes of exploring for, developing, and removing of the natural resources from the subsoil and seabed of the outer Continental Shelf. In addition, at all times pertinent herein, Amerada Hess Corporation (hereinafter "Hess") maintained a dockside facility in Cameron, Louisiana, adjacent to Calcasieu Pass, a navigable stream. Hess had contracted with PHI to have PHI provide helicopter services to transport supplies and personnel for Hess operations conducted on the outer Continental Shelf, which Hess operations were for the purpose of exploring for, developing, and removing of natural resources from the subsoil and seabed of the outer Continental Shelf.

On November 19, 1990, PHI employee Joseph B. Pickett was the pilot in command of helicopter N3536T. On this date, Pickett lifted his helicopter from a landing pad at PHI's Cameron heliport with the intent of performing an operational check flight of the aircraft, which is required by regulation after maintenance has been performed on the helicopter. Passengers may not be carried in the helicopter until the check flight has been successfully completed. Had the helicopter performed satisfactorily, it was Pickett's intent to then fly to the heliport located at the Hess facility to pick up personnel and supplies to be transported to Hess fixed offshore platforms on the outer Continental Shelf.

On November 19, 1990, Pickett lifted the helicopter from the ground in order to perform the operational check flight, but the helicopter did not perform as expected and began to slowly roll to the right. At an approximate altitude of 25 to 30 feet, the helicopter N3536T pointed downward, then descended and impacted the ground on its right side, coming to rest about 175 feet from the point of takeoff in the employee parking lot of the PHI base. Pilot Joseph Pickett was ejected and during the accident sequence was struck by the helicopter blades, thereby sustaining fatal injuries. At the time of his death, Joseph Pickett was lawfully married to and living with his wife, Margie A. Pickett, the petitioner in this case, and one minor child, Michael B. Pickett, born May 5, 1973.

Subsequent to the above-referenced accident, Wausau Insurance Companies (Wausau), PHI's worker's compensation carrier, paid benefits to petitioner under the Louisiana Workers' Compensation Act, and she currently continues to receive such benefits. However, petitioner has taken the position that benefits should have been paid under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. § 901, *et seq.*, through the provisions of the Outer Continental Shelf Lands Act that adopt the provisions of the LHWCA.

B. Decisions of the Lower Courts

Petitioner Margie Pickett sought benefits pursuant to the LHWCA as adopted in the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(b). A hearing was held on October 6, 1999 before the Honorable Clement J. Kennington, Administrative Law Judge, and post-hearing briefs were filed by the parties. After considering the facts and the applicable law, Judge Kennington issued a Decision

and Order Denying Benefits on November 15, 1999. Therein, Judge Kennington concluded that the petitioner was not entitled to LHWCA benefits through OCSLA because the accident in question did not occur on the outer Continental Shelf.[1]

Petitioner appealed Judge Kennington's decision to the Benefits Review Board. On October 31, 2000, the Benefits Review Board issued a Decision and Order affirming Judge Kennington's ruling, concluding that such ruling was supported by the jurisprudence of the United States Court of Appeals for the Fifth Circuit, which was controlling.

Petitioner next filed her Petition for Review in the United States Court of Appeals for the Fifth Circuit. On September 28, 2001, the Fifth Circuit issued an opinion in which it affirmed the decision of the Benefits Review Board in favor of PHI and Wausau. *Pickett v. Petroleum Helicopters, Inc.*, 266 F.3d 366 (5th Cir. 2001). Following its prior precedent in *Mills v. Director, OWCP*, 877 F.2d 356 (5th Cir. 1989) (en banc), the Fifth Circuit concluded, as had the lower courts, that petitioner was not entitled to benefits through the LHWCA as adopted by OCSLA because the decedent's accident did not occur on the outer Continental Shelf. *Pickett*, 266 F.3d at 368. Following the issuance of this opinion, petitioner filed a Petition for Rehearing En Banc with the Fifth Circuit, which was denied by that court on October 25, 2001.

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1. Although counsel for petitioner had acknowledged at the hearing that decedent was not a longshoreman and thus the status requirement of the LHWCA was not met, Judge Kennington nevertheless addressed the question of whether petitioner was directly entitled to LHWCA benefits and concluded that she was not directly entitled to such benefits because the situs of the accident did not satisfy the requirements of that statute. Petitioner did not appeal this aspect of Judge Kennington's decision.

Petitioner then filed her Petition for a Writ of Certiorari asking this Court to review the decision of the Fifth Circuit on the issue of whether she is entitled to receive benefits pursuant to the LHWCA through the OCSLA.

REASONS FOR DENYING THE WRIT

PHI and Wausau submit that the Petition for Writ of Certiorari filed by petitioner should be denied. The decision of the Fifth Circuit, wherein it concluded that LHWCA benefits are not available pursuant to OCSLA unless the accident out of which the claim for benefits arose occurred on the outer Continental Shelf, is supported by the language of OCSLA and the underlying purposes sought to be achieved by Congress in enacting OCSLA. For this same reason, there is no support in either the text or the legislative history of OCSLA for petitioner's suggestion that this Court should create a class of worker called the "Offshore Lands Worker" pursuant to which LHWCA benefits would be payable to any worker who spends a substantial portion of his work time on the outer Continental Shelf and who is injured while in the course and scope of his employment, regardless of whether he is present on the Shelf at the time of such injury. Creation of such a class of workers would in fact be contrary to the purposes sought to be achieved by OCSLA, a statute that was clearly intended to govern a geographical location rather than a certain class of workers. Finally, although petitioner contends that the Court should grant the writ in order to resolve a conflict between the Fifth Circuit and the Third Circuit on this issue, PHI and Wausau submit that this "conflict" between the circuits is not sufficiently significant in proportion to justify this Court's consideration of the issue at this time. When the Third Circuit decided *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir.

1988), it relied heavily on prior Fifth Circuit jurisprudence, as well as one Ninth Circuit case, all of which it interpreted as supporting its conclusion that an outer Continental Shelf situs was not a prerequisite for recovery of LHWCA benefits pursuant to the LHWCA. Subsequently, however, the Fifth Circuit has consistently held that recovery of LHWCA benefits through OCSLA is *only* permitted if the employee was injured or killed on the outer Continental Shelf. It is believed that in view of such jurisprudence, as well as subsequent Ninth Circuit jurisprudence providing support for the Fifth Circuit's view, the Third Circuit, if faced with this issue today, would decide such issue in the same manner as the Fifth Circuit. For these reasons, discussed more fully below, PHI and Wausau submit that the instant case does not present a situation where intervention by this Court is necessary or justified.

I.

THE TEXT OF OCSLA AND THE PURPOSE SOUGHT TO BE ACHIEVED BY CONGRESS IN ENACTING SUCH STATUTE SUPPORT A CONCLUSION THAT AN OUTER CONTINENTAL SHELF SITUS IS A PREREQUISITE FOR RECOVERY OF LHWCA BENEFITS THROUGH OCSLA

Although petitioner argues that an outer Continental Shelf situs is not a prerequisite to recovery of LHWCA benefits through OCSLA, the text of OCSLA and the purpose sought to be achieved by Congress in enacting such statute support a contrary conclusion.

The LHWCA provides, in pertinent part, as follows:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of any disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building, way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a). Petitioner has acknowledged that decedent was not a longshoreman and that, accordingly, she is not entitled to recover benefits under the LHWCA directly. Instead, petitioner argues that she is entitled to LHWCA benefits pursuant to OCSLA, which provides, in pertinent part, as follows:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901, *et seq.*]

43 U.S.C. § 1333(b).

Although it might be argued that the above-quoted language does not clearly communicate that an outer Continental Shelf situs for the accident giving rise to the claim for benefits is a prerequisite to entitlement to LHWCA benefits through section 1333(b), it is abundantly clear from both the text of OCSLA as a whole and the jurisprudence interpreting such statute that Congress intended, by enacting such statute, to provide for the law to be applied to only a limited geographical area. With regard to the Congressional policy sought to be furthered by enactment of OCSLA, 43 U.S.C. § 1332 provides, in pertinent part, that "[it] is hereby declared to be the policy of the United States that . . . the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act . . ." 43 U.S.C. § 1332(1). In the same section, it becomes evident that the statute was intended to regulate the important natural resources that are located on the outer Continental Shelf; the section provides that it is also the policy of the United States that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs. . . ." 43 U.S.C. § 1332(3). There is certainly no suggestion, in the policy considerations set forth in 43 U.S.C. § 1332, that OCSLA was intended in any manner to dictate the substantive laws to be applied with respect to matters occurring within the geographical boundaries of the states. Rather, as has been recognized by this Court, "[t]he purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil and the fixed structures . . . on the outer Continental Shelf." *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 355 (1969).

It is likewise clear that Congress, in enacting OCSLA, intended to fill what it perceived to be voids in the law applicable to such geographic areas. In *Rodrigue*, this Court discussed the legislative history of OCSLA and noted that in the debate in the Senate concerning the statute, it was recognized that

> the problem addressed by the committee had been raised by "the fact that the full development of the estimated values in the shelf area will require the efforts and the *physical presence of thousands of workers on fixed structures in the shelf area*. Industrial accidents, accidental death, peace, and order" present problems requiring a body of law for their solution.

Rodrigue, 395 U.S. at 358 (emphasis added). Accordingly, Congress enacted 43 U.S.C. § 1333(a)(2)(A), which adopted state law as surrogate federal law where not inconsistent with existing federal law. Such section provides, in pertinent part, as follows:

> To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended

> seaward to the outer margin of the outer Continental Shelf. . . .

In order to further fill the void with regard to law applicable to the outer Continental Shelf, Congress determined that workers injured on the Shelf should be governed by a worker's compensation scheme. Accordingly, 43 U.S.C. § 1333(b) was enacted to adopt the LHWCA by reference. Such provision states, in pertinent part, as follows:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, of the subsoil and seabed of the outer Continental Shelf compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. . . .

Petitioner contends that there is nothing in section 1333(b) that precludes the interpretation that she accords to this provision, that is, that LHWCA benefits should be payable pursuant to this provision to any worker who spends a substantial portion of his work time on the outer Continental Shelf and who is injured while in the course and scope of his employment, regardless of whether he is present on the Shelf at the time of such injury. However, it should also be noted that there is nothing in section 1333(b) that lends any support for such a novel interpretation of this provision. Further, although the language utilized in section 1333(b), "resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf," may not be a model of clarity, this language cannot be read in a vacuum,

but must be interpreted in conjunction with the other provisions of section 1333 and the legislative history of the statute as a whole. Section 1333, concerning applicable law, contains numerous subdivisions other than section 1333(b) (which adopts the provisions of the LHWCA), yet none of the other subsections purport to extend beyond the boundaries of the outer Continental Shelf itself. Subsection (a) of section 1333, which establishes the substantive law to be applied to the outer Continental Shelf, only applies to activity that occurs on the Shelf; subsection (c) applies the National Labor Relations Act to unfair labor practices *on platforms on the outer Continental Shelf*; subsection (d) provides the Coast Guard with authority to promulgate rules and regulations with respect to safety matters *on the platforms on the outer Continental Shelf and adjacent waters*; subsection (e) accords authority to the Secretary of the Army to prevent obstruction to navigation to the platforms on the *outer Continental Shelf*; and subsection (f) provides that the foregoing provisions are not exclusive and should not be read to exclude the application of other federal laws to the *subsoil and seabed of the outer Continental Shelf and platforms on such Shelf or to acts or offenses occurring or committed thereon*. When Section 1333(b) is considered in light of the application of the other provisions in section 1333 and the legislative intent to develop a body of law to be applied to a specific geographic area, that is, the outer Continental Shelf, it cannot be doubted that the intent of Congress in enacting Section 1333(b) was to allow recovery of benefits under the LHWCA to workers or their survivors who are injured or killed *on the outer Continental Shelf*.

This conclusion is strengthened by the fact that it was the intent of Congress, in enacting OCSLA, to fill voids in the substantive law to be applied to the outer Continental

Shelf. Inasmuch as no void existed with respect to the applicable compensation scheme for workers killed or injured within the territorial boundaries of a state, there was no reason for Congress to draft Section 1333(b) in a manner that would provide for application of the LHWCA beyond the geographic boundaries of the outer Continental Shelf. This Court's decision in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) contains language supporting this conclusion. In *Tallentire*, this Court refused to apply 43 U.S.C. § 1333(a) to platform workers who were not killed on the platform but were killed miles away in the high seas, pointing out that "Congress determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined *principally by locale, not by the status of the individual injured or killed*." *Id.* at 219 (emphasis added). The Court went on to observe in a footnote that "[o]nly one provision of OCSLA *superimposes a status requirement on the otherwise determinative OCSLA situs requirement*; § 1333(b) makes compensation for the death or injury of an 'employee' resulting from certain operations on the Outer Continental Shelf payable under the Longshoremen's and Harbor Workers' Compensation Act." *Id.* at 119 n.2 (emphasis added). By stating that in section 1333(b) the requirement of employee status was "superimposed" on the "otherwise determinative OCSLA situs requirement," this Court clearly expressed a belief that application of section 1333(b) required *both* an employee status *and* an outer Continental Shelf situs. *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 471 (1992), wherein this Court observed that "[t]he platform [on which plaintiff suffered injury] was located on the Outer Continental Shelf, *an area subject to the [LHWCA]*." (emphasis added). Thus, the Fifth Circuit's conclusion that an outer Continental Shelf accident situs is a necessary prerequisite to recovery of LHWCA benefits

through OCSLA is not only consistent with the text and purpose of OCSLA, but is also consistent with language found in the decisions of this Court.

II.

NEITHER THE LANGUAGE OF OCSLA NOR THE LEGISLATIVE HISTORY OF SUCH STATUTE SUPPORTS PETITIONER'S SUGGESTION THAT THIS COURT SHOULD CREATE A CLASS OF WORKER CALLED THE "OFFSHORE LANDS WORKER"

It is respectfully submitted that there is nothing in the text of 43 U.S.C. § 1333, or in the legislative history of OCSLA, that supports petitioner's suggestion that this Court should create a class of worker called the "Offshore Lands Worker" pursuant to which LHWCA benefits would be payable to any worker who spends a substantial portion of his work time on the outer Continental Shelf and who is injured while in the course and scope of his employment, regardless of whether he is present on the Shelf at the time of such injury. Rather, creation of such a class of workers would be contrary to the text of OCSLA as well as the public policy sought to be advanced by enactment of OCSLA, a statute which, as discussed above, is clearly intended to govern a geographical location rather than a certain class of workers.

Further, petitioner's attempt to liken her suggested class of "Offshore Lands Workers" to seaman's status under the Jones Act must fail. Petitioner points out that a Jones Act seaman does not "walk in and out of coverage," but rather keeps his status as a seaman even when he is on land, as long as he is in the course and scope of his employment.

Petitioner goes on to suggest that there is no reason to accord different treatment to the "Offshore Lands Worker" who spends a substantial portion of his time on the outer Continental Shelf, and that he too should keep his status even when not present on the Shelf. Petitioner's argument, however, ignores a fundamental difference between the purpose of OCSLA and the purpose of the Jones Act. The Jones Act is, by its terms, status oriented; that is, it creates a right of action in favor of "any seaman" who suffers injury or death in the course of his employment. 46 U.S.C. § 688. Thus, Congress, in enacting the Jones Act, created the status of "seaman," although it left to the courts the burden of developing an appropriate definition for this term. OCSLA, on the other hand, does not provide a right to be accorded to individuals with a certain status; rather, as is discussed above, it was enacted to provide for the law to be applied to a certain geographical area, that is, the outer Continental Shelf. Thus, whereas the courts by necessity must interpret the term "seaman" in order to apply the Jones Act, there is nothing in OCSLA that invites or requires the courts to create a class of workers such as the "Offshore Land Workers" class advocated by petitioner.

III.

THE "CONFLICT" BETWEEN THE CIRCUITS ON THE ISSUE OF WHETHER AN OUTER CONTINENTAL SHELF SITUS IS NECESSARY FOR RECOVERY OF LHWCA BENEFITS THROUGH OCSLA IS NOT SUFFICIENTLY SIGNIFICANT IN PROPORTION TO JUSTIFY THIS COURT'S CONSIDERATION OF SUCH ISSUE

Petitioner contends that this Court should grant the writ in order in order to resolve a conflict between the Fifth Circuit and the Third Circuit on the question of whether an outer Continental Shelf situs is a prerequisite to recovery of LHWCA benefits through OCSLA. Although PHI and Wausau acknowledge that, as the jurisprudence now stands, there exists a conflict between the Fifth and Third Circuits on this issue, such conflict certainly does not obligate this Court to grant the writ sought by petitioner. Rather, the Court certainly may, in its vast discretion, refuse to grant such writ, U.S. Sup. Ct. R. 10, and PHI and Wausau submit that such a denial is warranted in this case. The "conflict" between the circuits is simply not sufficiently significant in proportion to justify this Court's consideration of the issue at this time, particularly inasmuch as it seems probable that, if faced with the issue today, the Third Circuit would decide such issue in the same manner as the Fifth Circuit.

In support of its contention that a conflict among the circuits exists that should be resolved by this Court, petitioner relies heavily on the 1988 decision of the Third Circuit in *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988), wherein such Court concluded that an injured employee or his survivors could recover LHWCA benefits through OCSLA even where the accident did not occur on

the outer Continental Shelf, as long as it could be said that the accident would not have occurred "but for" operations on the outer Continental Shelf. *Id.* at 811. Significantly, however, in reaching this conclusion the Third Circuit heavily relied on prior cases that had been decided by the Fifth Circuit, including *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982) and *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir. 1982), as well as one Ninth Circuit case, *Kaiser Steel Corp. v. Director, Office of Workers' Compensation Programs*, 812 F.2d 518 (9th Cir. 1986). Despite the fact that these cases (as well as other cases cited by the *Curtis* court) involved accidents that occurred on a platform on the outer Continental Shelf or in the waters above the Continental Shelf and thus were distinguishable from the factual scenario presented to the court in *Curtis*, nevertheless the court interpreted language found in these cases as supporting a conclusion that LHWCA benefits could be recovered through OCSLA even where the accident occurred on land, as long as the "but for" test was met. Accordingly, it found that plaintiff, who had been involved in a vehicular collision on a New Jersey highway while driving to Atlantic City to meet the helicopter that was to fly him to an offshore drilling rig, was entitled to recover LHWCA benefits.

Since *Curtis* was decided, the Fifth Circuit has consistently held that recovery of LHWCA benefits through OCSLA is *only* permitted if the employee was injured or killed on an outer Continental Shelf situs, that is, on a platform located on, or in the waters above, the outer Continental Shelf. *See Mills v. Director, OWCP*, 877 F.2d 356, 361-62 (5th Cir. 1989) (en banc); *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 558 (5th Cir. 1998); *Demette v. Falcon Drilling Co.*, 2002 U.S. App. LEXIS 745 *12-13 (5th Cir. 1/16/02). This requirement was first enunciated by the

Fifth Circuit in *Mills*. In that case, claimant was a land-based welder who was injured while building an offshore oil platform in Amelia, Louisiana. Claimant sought to recover LHWCA benefits through OCSLA. On appeal of the BRB's denial of such benefits, a panel of the Fifth Circuit initially reversed, concluding that

> Mills qualified for workers' compensation benefits under OCSLA because (1) he would not have been injured but for operations on the OCS; and (2) his welding work during platform construction "furthered the operation of a fixed rig on the shelf and . . . [occurred] in the regular course of extractive operations on the shelf.

Mills, 877 F.2d at 358 (discussing panel's decision). Thereafter, however, the Fifth Circuit granted a rehearing *en banc* and affirmed the findings of the BRB, concluding that claimant was not entitled to LHWCA benefits through OCSLA because he did not satisfy the "situs-of-injury" requirement for such coverage. *Id.* at 357. In reaching this conclusion, the court explained as follows:

> The Director argues that we imposed no situs requirement for § 1333(b) coverage in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), and *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), *cert. denied sub nom. Stansbury v. Chevron U.S.A., Inc.*, 459 U.S. 1089, 103 S. Ct. 573, 74 L. Ed. 2d 935 (1982). The Director's reliance on those cases is misplaced.
>
> *Barger* and *Stansbury* held that § 1333(b) extended the LHWCA as the sole remedy for survivors suing

> the employers of individuals who (1) satisfied the "but for" status test; and (2) died in helicopter crashes on the high seas above the OCS. Although some of the dicta in those opinions may be overly broad, we have no quarrel with those holdings to the extent they grant LHWCA benefits to oilfield workers injured on waters above the OCS. *We do not interpret those cases to read § 1333(b) as extending LHWCA benefits to oilfield workers injured on land or state territorial waters.* But cf. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988) (Section 1333(b) covers OCS platform worker injured in car accident on New Jersey Garden State Parkway while driving to meet helicopter that would have flown him to rig).
>
> *Given that congress intended to establish a bright-line geographic boundary for § 1333(b) coverage, we now draw that line. We hold that LHWCA coverage as extended under § 1333(b) applies to employees who (1) suffer injury or death on an OCS platform or the waters above the OCS; and (2) satisfy the "but for" status test this court described in Herb's Welding, Inc. v. Gray, 766 F.2d 898, 900 (5th Cir. 1985).* As a land-based worker injured on Louisiana soil, Mills must look to state compensation laws for his benefits.

Id. at 361-362 (emphasis added). Thus, in *Mills* the Fifth Circuit clearly held that a claimant who does not suffer injury or death either on an outer Continental Shelf platform or the waters above the outer Continental Shelf simply cannot recover LHWCA benefits by virtue of OCSLA.

This situs requirement for LHWCA through OCSLA was subsequently confirmed by the Fifth Circuit in *Sisson*, *supra*, a case that is particularly analogous to the instant case. In *Sisson*, plaintiff injured his back carrying a piece of drill pipe while he was constructing a guardrail around a parking lot for Gulf Oil Exploration, a company with whom his employer contracted. The parking lot was at a heliport used by Gulf Oil to transport crewmen to oil platforms on the outer Continental Shelf. The injury site was approximately one mile from the Gulf dock and fifty yards from navigable waters. In the first part of the opinion, which is no longer relevant to the instant case, the Court concluded that plaintiff was not directly entitled to LHWCA coverage, based on the fact that the parking lot was not customarily used in loading, unloading, repairing or building a vessel. *Sisson*, 131 F.3d at 557-8. The court then proceeded to address the plaintiff's claim that he was nevertheless entitled to LHWCA benefits through OCSLA. The court summarily concluded that plaintiff was not entitled to such benefits, noting that in *Mills*, it had held that an employee had to be injured on the outer Continental Shelf to obtain LHWCA benefits through OCSLA. *Mills* foreclosed OCSLA relief for plaintiff because plaintiff was not injured on the outer Continental Shelf. *Id.* at 557.

After its decision in the instant case, confirming the situs requirement for recovery of LHWCA benefits through OCSLA, the Fifth Circuit most recently confirmed its position once again in *Demette*, 2002 U.S. App. LEXIS 745, wherein it stated that "[i]n order for the LHWCA to apply by virtue of section 1333(b) . . . the injured worker must satisfy the status requirement of section 1333(b) as well as the situs requirement of section 1333(a)(1)." *Id.* at *12-13.

Subsequent to the time the Third Circuit rendered its decision in *Curtis*, the Ninth Circuit has also clarified its position on this issue. As is noted above, the *Curtis* court had relied in part on the decision of the Ninth Circuit in *Kaiser Steel Corp.*, *supra*, decided in 1987. In *Kaiser*, the plaintiff was injured while he was working as a pipefitter/welder on a platform that was being constructed on the outer Continental Shelf. In connection with its determination that such plaintiff was entitled to recover LHWCA benefits through OCSLA, the court utilized some overly broad language, stating that

> [i]n the absence of any other limitation on the face of the statute or in the legislative history of the Lands Act, section 1333(b) should be construed as extending Longshore Act coverage to all victims of disabling or fatal injuries sustained while working to develop the mineral wealth of the OCS.

Kaiser Steel Corp., 812 F.2d at 522. This language, taken literally, might be interpreted to support a conclusion that LHWCA benefits through OCSLA may very well be recovered even where the accident occurred on land, and indeed, it is this language that the *Curtis* court cited in support of its conclusion in this regard. However, language in subsequent Ninth Circuit decisions reveals that such an interpretation was not intended. In *Saif Corporation/Oregon Ship v. Johnson*, 908 F.2d 1434 (9th Cir. 1990), the court concluded that plaintiff, who had been exposed to asbestos while he was working on a ship building way, was not entitled to recover LHWCA benefits directly under such statute because the building way was not located on navigable waters and was not a dry dock, so the situs did not meet the

requirements of the LHWCA. In distinguishing certain cases cited by plaintiff, the Ninth Circuit discussed *Kaiser Steel Corp.* as follows:

> In *Kaiser Steel Corp. v. Director, OWCP*, 812 F.2d 518 (9th Cir. 1987), the claimant was injured while working on a "stationary, offshore oil platform under construction." *Id.* at 520. When we held there was coverage in that case, we were actually construing the Lands Act, 43 U.S.C. § 1333(b), which extended the "scope of coverage provided by the Longshore Act to include certain employees injured in the course of their work on the [Outer Continental Shelf.]" *Id.* at 520. This case does not involve an injury which occurred on the Outer Continental Shelf.

Id. at 1438. In view of the fact that the Ninth Circuit distinguished *Kaiser Steel Corp.* on the grounds that the case before it "d[id] not involve an injury which occurred on the Outer Continental Shelf," it is clear that the Ninth Circuit did not intend *Kaiser Steel Corp.* to stand for the proposition that LHWCA benefits might be recovered through OCSLA where the accident did not occur on the outer Continental Shelf. More recently, in *A-Z International v. Phillips*, 179 F.3d 1187 (9th Cir. 1999), the Ninth Circuit discussed the fact that the ALJ, in the case before it, had denied plaintiff's claim of LHWCA benefits through OCSLA on the grounds that plaintiff was not injured on the offshore platform as alleged and thus did not meet OCSLA's situs requirement. In a footnote the court observed that "[t]he situs requirement is a predicate for coverage under OCSLA." *Id.* at 1189 n.1.

It is clear that the Third Circuit's interpretation in *Curtis* of prior jurisprudence from the Fifth and Ninth Circuits has been shown to be mistaken; contrary to the belief of the *Curtis* court, those cases do not stand for the proposition that a claimant may receive LHWCA benefits through OCSLA where the underlying accident did not occur on an outer Continental Shelf situs; rather, when these cases are read in conjunction with more recent jurisprudence, it is clear that an accident must have an outer Continental Shelf situs in addition to meeting the "but for" test in order for LHWCA benefits to be recovered through OCSLA. Respondents believe it is probable that, if faced with this issue today, in view of the current state of the jurisprudence, the Third Circuit would decide the issue in the same manner as the Fifth Circuit has done in this case and would conclude that LHWCA benefits may not be recovered through OCSLA where the accident giving rise to the claim for benefits did not have an outer Continental Shelf situs.

For the foregoing reasons, PHI and Wausau submit that the "conflict" between the circuits on the issue of whether an outer Continental Shelf situs is a prerequisite to recovery of LHWCA benefits through OCSLA is simply not sufficiently significant in proportion to justify this Court's consideration of the issue at this time. The Fifth Circuit's conclusion that an outer Continental Shelf situs is required is consistent with the text and purpose of OCSLA and is consistent with language utilized by this Court in its jurisprudence. The only case that has been decided in a contrary manner was decided by the Third Circuit in 1988 and its rationale has been subsequently undermined by more recent jurisprudence, which would likely cause such court to concur with the Fifth and Ninth Circuits if the issue were addressed today. In view of these circumstances, there is no compelling need for this Court to grant the writ sought by petitioner.

IV.

NO MATTER OF NATIONAL IMPORTANCE IS AT STAKE

Petitioner contends that this case raises an issue of national importance because of the number of workers who may be affected by the Fifth Circuit's decision. She further contends that these "Offshore Lands Workers" and their families are being denied "equal protection" guaranteed by the United States Constitution. Despite petitioner's general contentions in this regard, the issue raised by petitioner is not sufficiently significant to justify this Court's grant of the writ sought by petitioner, as has been previously discussed. Further, petitioner does not cite, nor can she cite, any authority to support her argument that "Offshore Lands Workers" are being denied equal protection. These workers do not comprise a recognized class of persons, but rather, are included in the classes of non-seamen that are covered by various state worker's compensation systems. Petitioner in this case, Margie Pickett, is receiving benefits under the Louisiana Worker's Compensation Act, and as such is being treated in precisely the same manner as any other non-seaman or survivor of a non-seaman who is injured or killed on Louisiana soil. This case does not raise a matter of national importance. Rather, this case arises from petitioner's desire to recover the greater benefits available under the LHWCA in lieu of the benefits she is receiving under the Louisiana Worker's Compensation Act. However, the facts of this case simply do not support petitioner's claim for benefits under the LHWCA.

CONCLUSION

For the foregoing reasons, Petroleum Helicopters, Inc. and Wausau Insurance Companies respectfully request that this Honorable Court deny the Petition for Writ of Certiorari submitted by petitioner Margie A. Pickett.

Respectfully submitted,

KENNETH H. LABORDE*
LEO R. MCALOON, III
GINA S. MONTGOMERY
PULASKI, GIEGER & LABORDE
Suite 4800, One Shell Square
New Orleans, Louisiana 70139
(504) 561-0400

Attorneys for Respondents
Petroleum Helicopters, Inc.
and Wausau Insurance Companies

* *Counsel of Record*